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BANDAR ECO-SETIA SDN BHD v. ANGELANE ENG

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF PCA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ZAINUN ALI FCJ
B MOHAMED APANDI ALI FCJ
ABU SAMAH NORDIN FCJ
[CIVIL APPEAL NO: 02(f)-17-02-2014 (B)]
25 NOVEMBER 2015

C ***ADMINISTRATIVE LAW:*** *Equitable relief – Deed of mutual covenants – Breach – Decree of specific performance – Principles for grant of equitable relief – Whether application must come within terms of covenant – Whether applicant must act bona fide – Whether must conform to object and purpose covenant originally entered into – Whether could be debarred by laches and acquiescence*

D ***LAND LAW:*** *Covenants – Restrictive covenant – Property management company – Gated community – Deed of mutual covenant with homeowners – Breach – Decree of specific performance – Principles for grant of relief – Whether homeowners obligated to honour terms of deed – Whether bound to observe objective of deed – Whether bound to rectify breach – Defences – Defences of waiver, laches and* E *acquiescence – Principles and applicability*

The respondent purchased a vacant lot of land in a gated housing project developed and managed by the appellant with a view of constructing a bungalow house thereon, and to that end, had executed a deed of mutual covenant ('DMC') with the appellant, and with the other homeowners F therein, principally to preserve the character of their guarded property. By the DMC, the parties covenanted that the construction of the houses would accord with the Building Guidelines as spelt out in the DMC ('the Guidelines'). It was not in dispute that while the Guidelines authorised the appellant to grant certain relaxations in the construction of houses, it also G allowed them to take action against errant homeowners, to compel compliance with the Guidelines. The facts further showed that the respondent, in undertaking construction of her house in 2007, had breached the terms of the Guidelines (breaching height limit of 12 metres *etc.*). The appellant had seemingly acquiesced in the breaches, as evidenced by their act H of giving a 5% rebate upon the early completion of the house in 2009, and approving the respondent's Owner Occupancy Registration form. Subsequently, however, the appellant demanded that the respondent rectify the breaches and, notwithstanding that the respondent had already moved into the house, issued a stop-work notice on the property. The respondent I applied/appealed for a waiver of the breaches but nothing turned on that. Be that as it may, some 16 months later, on 25 April 2011, the appellant commenced an action against the respondent seeking declaration that the respondent had breached the DMC and the Guidelines, and for specific performance of the terms of the DMC.

The High Court Judge, in allowing the claim and rejecting the respondent's defence of acquiescence, selective prosecution (since no action taken against some errant homeowners), estoppel and laches, ruled that a strict enforcement of the terms of the DMC was essential, having regard to the object and purpose of the DMC and the fact that the project was within a gated community. It was further held, following *Taikoo Shing (Management) Ltd v. Trillion (HK) Ltd,* that the equitable defences of acquiescence and estoppel were not available to the respondent, as the appellant was a trustee for the enforcement of the covenants. On appeal, the Court of Appeal however reversed the High Court. It was opined that the defences of estoppel and acquiescence ought to have been made available to the respondent, as would bar the relief of specific performance sought by the appellant. The appellant was granted leave to appeal and essentially posed the following questions of law to the learned justices of the apex court, namely: (i) whether DMC constituted a contract between the appellant and the respondent and all homeowners *inter se*, and in any case whether the defence of acquiescence or estoppel was available to the respondent; and (ii) whether a court holding a party in breach of a contract notwithstanding the defences of acquiescence or estoppel in answer to a cause of action, could refuse the relief of specific performance on the same defences.

Held (allowing appeal; answering questions in the negative)
Per Zainun Ali FCJ delivering the judgment of the court:

(1) The Court of Appeal committed an error in its judgment when it failed to give due consideration to the object and purpose of the DMC and the Guidelines. The Guidelines are essential for purposes of uniformity in the construction of the houses in the housing area. It stands to reason that in construing the provisions of the Guidelines, the homeowners including the respondents are to adhere to the objectives of the Guidelines. (para 43 & 53)

(2) The Court of Appeal erred in its approach and interpretation of s. 35.2 of the DMC. Section 35.2 ought to be read in conjunction with s. 30.1(b) thereof, which deals with the contractual relationship between an owner and each Precinct 3 owner; and that, in such a situation, the appellant has a discretion to enforce the terms of the DMC against any or all non-complying Precinct 3 owners. It is also to be noted that in respect of any breach of the Guidelines (as per s. 34), it is for the appellant to proceed in law or in equity to compel compliance with the Guideline. (paras 31 & 32)

(3) The relief of specific performance is a discretionary remedy whereby the court will consider the conduct of the plaintiff and the circumstances of the defendant before making a decree. Standard grounds of defence in equity such as laches and acquiescence will provide a defence to a claim

A for specific performance. In common law, there can be no reason why these defences cannot be extended to cases involving breaches of deeds of mutual covenants.) (para 37)

(4) Bearing in mind the law as propounded in *Knight v. Simmonds*, the applicable principles when dealing with a claim for specific performance
B arising from a breach of mutual covenants are as follows: (i) a covenantee who seeks a decree of specific performance must bring his case within the plain meaning of the contract which he is seeking to enforce; (ii) he must act *bona fide* which means that the action must be brought for the purpose of giving effect to the object of the covenant; (iii)
C the terms of the covenant will not be enforced 'if the land has also been so laid out or used that its preservation as intended is no longer possible'. Thus, equitable relief to enforce the covenants will be refused if the plaintiff has debarred himself from such relief by delay or acquiescence; and (iv) waiver of breaches in any single instance of the
D covenants must not be construed so as to render the whole object of the covenant to be at an end. Hence, the fact that some homeowners have breached a term of the covenants and there is evidence of waiver of such breach, do not have the effect of releasing other covenantors from any restrictive covenant of the same kind. (paras 40 & 41)

E **(5)** The proposition of law that a property management company vested with the responsibility to enforce mutual covenants is capable of acquiescing in a breach so long as the particular breach does not destroy the whole object for which the covenants were originally entered into – which was adopted by the Court of Appeal – cannot be correct. Whilst
F it is true that such a property management company is capable of acquiescing in a breach of covenant, it is inaccurate or rather confusing to impose a requirement that such breach must not destroy the whole object for which the covenants were originally entered into. (para 50)

(6) The respondent had not informed the appellant about the variations that
G were made to the original design and plan of her bungalow, and only when she was asked to carry out rectification works that she lodged an appeal to the appellant for a waiver of such breach. Such overt acts on the part of the respondent suggests that she was merely taking a risk or pushing her luck when she caused to be erected a pitched roof which was
H higher than the approved limit, knowing full well she was in breach of the covenant. Thus, the respondent in relying on the equitable defences did not come with clean hands. (para 52)

(7) On the facts and the decided authorities, the appellant is entitled to a relief of specific performance. The orders made by the Court of Appeal
I were set aside and those of the trial judge restored. (para 52)

Bahasa Malaysia *Headnotes*

Responden telah membeli satu lot tanah di dalam satu kawasan perumahan berpagar yang dibangun dan diuruskan oleh perayu dengan hasrat untuk membina sebuah rumah banglo di situ, dan seterusnya, telah memeterai satu surat ikatan perjanjian bersama ('DMC') dengan perayu, serta dengan semua pemilik-pemilik rumah di situ bagi tujuan menjaga keunikan hartanah terkawal mereka. Melalui DMC, pihak-pihak berjanji bahawa pembinaan rumah-rumah akan mematuhi Panduan Bangunan ('Panduan') seperti yang diperuntukkan dalam DMC. Tidak dinafikan bahawa sementara Panduan membenarkan perayu memberi kelonggaran kepada pembinaan rumah, ia juga memberi kuasa kepada perayu mengambil tindakan terhadap pemilik-pemilik rumah yang ingkar, bagi memastikan kepatuhan pada Panduan. Fakta seterusnya menunjukkan bahawa responden, apabila membina rumahnya pada tahun 2007, telah melanggar terma-terma Panduan (melanggar had ketinggian rumah dan sebagainya). Perayu kelihatannya menerima pelanggaran-pelanggaran responden, terserlah daripada keputusan mereka memberi diskaun 5% kepada responden kerana menyiapkan rumah dengan lebih cepat pada tahun 2009, serta meluluskan borang Pendaftaran Penghunian Pemilik responden. Walaupun begitu, perayu meminta responden membetulkan pelanggarannya dan seterusnya mengeluarkan notis memberhenti kerja walaupun responden telah menduduki rumahnya. Responden memohon/merayu supaya perayu menerima pelanggaran dengan seadanya, tetapi tiada apa-apa jawapan diberikan oleh perayu. Lebih kurang 16 bulan kemudian, iaitu pada 25 April 2011, perayu memulakan tindakan terhadap responden untuk perisytiharan bahawa responden telah melanggar DMC dan Panduan, dan untuk pelaksanaan spesifik terma-terma DMC.

Hakim Mahkamah Tinggi, dalam membenarkan tuntutan dan menolak pembelaan persetujuan, pendakwaan terpilih, estopel dan kelengahan, memutuskan bahawa pelaksanaan secara ketat terma-terma DMC adalah penting, mengambil kira tujuan dan maksud DMC, dan fakta bahawa projek berada di dalam komuniti berpagar. Diputuskan selanjutnya, berdasarkan *Taikoo Shing (Management) Ltd v. Trillion (HK) Ltd,* bahawa pembelaan berekuiti persetujuan dan estopel tidak terbuka untuk responden, kerana perayu ialah pemegang amanah untuk pelaksanaan perjanjian. Atas rayuan, Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi. Diputuskan bahawa berdasarkan fakta, pembelaan persetujuan dan estopel harus boleh diguna oleh responden bagi menghalang relif pelaksanaan spesifik yang dipohon perayu. Perayu diberi kebenaran merayu dan secara asasnya mengemukakan soalan undang-undang berikut: (i) sama ada DMC adalah satu kontrak antara perayu dan responden dan antara pemilik-pemilik hartanah *inter se*, dan walau apapun, sama ada pembelaan persetujuan atau estopel terbuka untuk responden; dan (ii) sama ada mahkamah yang memutuskan bahawa sesuatu pihak itu telah melakukan pelanggaran kontrak

walaupun terdapat pembelaan persetujuan or estopel, dalam jawapannya kepada sesuatu kausa tindakan, boleh menolak relif pelaksanaan spesifik berasaskan pembelaan yang sama.

Diputuskan (membenarkan rayuan; menjawab soalan-soalan secara negatif)

Oleh Zainun Ali HMP menyampaikan penghakiman mahkamah:

(1) Mahkamah Rayuan khilaf dalam keputusannya kerana gagal memberi mempertimbangkan tujuan DMC dan Panduan. Panduan penting bagi memastikan keseragaman pembinaan rumah-rumah di kawasan perumahan tersebut. Adalah munasabah, dalam mentafsir peruntukan-peruntukan Panduan, bahawa pemilik-pemilik rumah termasuk responden perlu mematuhi objektif-objektif Panduan.

(2) Mahkamah Rayuan khilaf dalam pendekatan dan tafsiran yang diambil terhadap s. 35.2 DMC. Seksyen 35.2 harus dibaca bersama-sama dengan s. 30.1(b) yang berkaitan dengan hubungan kontraktual antara seorang pemilik dengan setiap pemilik lain Presint 3; dan bahawa, dalam keadaan sedemikian, perayu mempunyai budi bicara menguatkuasakan terma-terma DMC terhadap mana-mana atau semua pemilik Presint 3 yang ingkar. Harus diingat juga bahawa berkaitan dengan mana-mana pelanggaran Panduan (seperti yang tertera dalam s. 34), adalah menjadi tanggungjawab perayu untuk mengambil tindakan undang-undang atau ekuiti bagi memastikan kepatuhan Panduan.

(3) Relif pelaksanaan spesifik adalah remedi budi bicara di mana mahkamah akan menimbang kelakuan plaintif dan hal keadaan defendan sebelum membuat sebarang perintah. Alasan-alasan pembelaan standard di sisi ekuiti seperti kelengahan dan persetujuan adalah merupakan pembelaan kepada tuntutan pelaksanaan spesifik. Di sisi undang-undang common, tiada sebab mengapa pemakaian pembelaan-pembelaan ini tidak boleh dilanjutkan pada kes-kes pelanggaran surat ikatan perjanjian bersama.

(4) Mengambil kira kedudukan undang-undang seperti yang diutarakan dalam *Knight v. Simmonds*, prinsip yang terpakai apabila menangani tuntutan pelaksanaan spesifik berbangkit daripada pelanggaran perjanjian bersama adalah seperti berikut: (i) seorang *covenantee* yang berhasrat untuk mendapat perintah pelaksanaan spesifik hendaklah menentukan kesnya itu dirangkumi oleh maksud jelas kontrak yang hendak dilaksanakannya; (ii) beliau hendaklah bertindak secara *bona fide* yang bermakna tindakan hendaklah dibawa untuk memberi kesan pada objektif perjanjian; (iii) terma-terma perjanjian tidak akan dilaksanakan 'jika tanah telah digunakan sebegitu rupa sehingga pengekalannya seperti yang dipohon menjadi mustahil'. Oleh itu, relif berekuiti untuk menguatkuasakan perjanjian akan ditolak jika plaintif dihalang daripada relif tersebut atas kelengahan atau persetujuan; dan (iv) suatu tindakan tunggal untuk menerima sebarang pelanggaran perjanjian tidak boleh ditafsir sebagai menyebabkan berakhirnya keseluruhan objek perjanjian.

Oleh itu, fakta bahawa beberapa pemilik rumah telah melanggar terma perjanjian dan terdapat keterangan bahawa pelanggaran tersebut dibiarkan begitu sahaja, tidak akan membebaskan *covenantor* lain daripada hadangan-hadangan perjanjian yang sepertinya.

(5) Anjuran undang-undang bahawa sebuah syarikat pengurusan hartanah yang diberi tanggungjawab untuk menguatkuasakan perjanjian bersama dibolehkan bersetuju dengan pelanggaran selagi pelanggaran tidak memusnahkan seluruh tujuan untuk apa perjanjian tersebut dimeterai pada asalnya – yang diterima pakai oleh Mahkamah Rayuan – adalah tidak betul. Walaupun syarikat pengurusan hartanah sedemikian boleh bersetuju dengan pelanggaran, ianya tidak betul bahkan mengelirukan untuk mengenakan syarat bahawa pelanggaran tersebut tidak harus memansuhkan keseluruhan tujuan untuk apa perjanjian tersebut dimeterai.

(6) Responden tidak memberitahu perayu mengenai ubah suai yang dibuat terhadap reka bentuk dan pelan asal banglonya, dan apabila diminta untuk melakukan kerja-kerja rektifikasi barulah dia membuat rayuan kepada perayu memohon supaya pelanggaran diabaikan. Perbuatan responden secara terang-terangan menunjukkan bahawa dia hanya mencuba nasib dan bersedia mengambil risiko apabila dia mendirikan atap menegak yang lebih tinggi daripada had yang dibenarkan, dengan mengetahui sepenuhnya bahawa ianya melanggar perjanjian. Oleh itu, responden, dalam bergantung pada relif berekuiti, tidak datang dengan tangan yang bersih.

(7) Berdasarkan fakta dan autoriti yang sudah diputuskan, perayu berhak mendapat relif pelaksanaan spesifik. Perintah-perintah yang dibuat oleh Mahkamah Rayuan diketepikan manakala perintah-perintah Mahkamah Tinggi dikekalkan.

Case(s) referred to:

Cheung Yuet & Anor v. The Incorporated Owners of Oriental Gardens [1979] HKLR 536 ***(dist)***
German v. Chapman [1877] 7 Ch D 271 ***(refd)***
Knight v. Simmonds [1896] 2 Ch 294 ***(refd)***
Peek v. Matthews (1867) VCW 515 ***(refd)***
Roper v. Williams (1822) T&R 18 ***(refd)***
Taikoo Shing (Management) Ltd v. Trillon (HK) Ltd [1997] 4 HKC 304 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 78(1)

For the appellant - Gananathan Pathmanathan (Olivia Loh Yuet Ling, Simrenjeet Singh & Ng Yee Chien with him); M/s Gananathan Loh
For the respondent - Rajendra Navaratnam (Raja Kumar & Mak Hon Pan with him); M/s MK Chen & Leong

[Appeal from Court of Appeal; Civil Appeal No: B-02(NCVC)-186-01/2013 (overruled).]

Reported by Wan Sharif Ahmad

A

JUDGMENT

Zainun Ali FCJ:

Questions Of Law

[1] Where a Deed of Mutual Covenant (DMC) constitutes a contract between the developer and a homeowner and all homeowners *inter se*, whether the defence of acquiescence or estoppel is available when the developer's actions or inaction do not bind the other homeowners.

[2] Whether a court, that holds a party in breach of contract notwithstanding the defences of acquiescence or estoppel in answering to a cause of action, can refuse the relief of specific performance on the same defences.

Background Facts

[3] By a sale and purchase agreement dated 17 December 2004, the respondent purchased a vacant bungalow lot in the project located in Phase 1B of Precinct 3 in the Mukim Bukit Raja, District of Petaling, Selangor from the appellant who was the developer. The purchase was to facilitate the construction of a bungalow house on the vacant lot. The vacant lot is located within a gated and guarded housing project managed by the appellant.

[4] The parties also executed a deed of mutual covenant dated 17 December 2004 "(the DMC)". Section 3.4 of the DMC states that the objective of the DMC is to promote communal lifestyle, enjoyment and beneficial occupation by all homeowners and to regulate the relationship between the appellant and the purchasers. The DMC specifies rules and regulations to be complied with by the appellant and the respondent including other purchasers of vacant lots in the housing project. The DMC also governs the responsibility and obligation of all the homeowners in respect of the construction of their houses on their vacant lots. All houses which are erected in Precinct 3 are to be so erected in accordance with the Design, Building and Construction Guidelines (the building guidelines) as appended in sch. 5 to the DMC.

[5] Section 20.2 of the DMC and section 22.1 of the Building Guidelines imposes upon the purchasers of the vacant lots a requirement to obtain development approval from the appropriate authority ie, Majlis Bandaraya Shah Alam. It also requires the appellant's consent with regards to the design and construction of their houses before commencement of any construction work on their said lots.

[6] In the respondent's case, upon obtaining the said approved construction plan containing the design of her bungalow from Majlis Bandaraya Shah Alam (MBSA) dated 19 July 2007, the respondent then submitted the same to the appellant for approval.

[7] The design and construction consent was issued by the appellant on 31 October 2007. The height of the house as approved in the plan was 12.192m. This was based on the relaxation granted by the review panel of the appellant to the respondent, pursuant to s. 9 of the Fifth Schedule to the DMC on the building guidelines. The approved height limit was 12m under the DMC but in the respondent's case the review panel of the appellant allowed it to be increased to 12.192m.

[8] The respondent then commenced the construction of a bungalow on her land. In the course of constructing the same, the respondent made variations to the structure and design of the building, without first obtaining the appellant's approval. According to the respondent, the reason for the variation was because in February 2008, she was advised by a certain *feng-shui* master that her bungalow in its original design would not have a positive flow of energy and this would bring bad luck to her family. As a result the respondent instructed her architect to redesign the house. Despite the advice of her architect that the changes would offend the DMC, the respondent instructed the architect to go ahead with the construction. To avoid issues of ventilation and leakage, the new design featured a pitched roof instead of a flat roof as required in the original design. However the height of the said pitched roof exceeded the height limits under the DMC and building guidelines. But the respondent defended this departure/breach on grounds that it was necessary to maintain the bungalow's architectural proportions.

[9] It was not disputed that the respondent had breached the building guidelines of the DMC when the respondent's house exceeded the approved height limit of 12.192m. It now stands at a height of 14.4974 meters.

[10] Apart from the respondent, there were 40 purchasers of other vacant lots in Precinct 3 who had breached the DMC and building guidelines with regards to the height limitation. As highlighted by the trial judge, at the time of trial, the number of completed houses in Precinct 3 was only 66 out of a total of 278 vacant lots.

[11] The purchasers who built their homes scrupulously observing the DMC and building guidelines, were aggrieved by what they regarded as blatant disregard for the covenants. They lodged a complaint to the appellant against the errant purchasers. By a letter dated 18 March 2009, 15 purchasers of the vacant lot in Precinct 3 urged the appellant to take action against the errant purchasers, so as to avoid a precedent being set for the remaining 212 lots on which houses are yet to be constructed. This was followed by two more letters dated 17 June 2009 and 27 July 2009, demanding the appellant to strictly enforce the terms of the DMC against the errant purchasers.

[12] Following a site inspection carried out by the appellant on 3 June 2009, the design of the respondent's house including the height of the house was found to be in breach of the approved consent plan. By that time, (ie, June 2009), the construction of the respondent's house was at an

A advanced stage as the main frame and other structural works including a substantial structure of the building had been built and was close to completion. About three months later, ie, on 30 September 2009, the appellant gave the respondent a reward of a 5% rebate for early completion of the house.

B **[13]** The respondent made much of the said rebate given by the appellant since in an earlier meeting between the parties on 12 June 2009, the respondent was advised by the appellant that the construction of the house was not in accordance with the approved plans. The non-compliances were then particularised by the appellant in its letter dated 24 June 2009 to the C respondent. The appellant demanded the respondent to carry out rectification works on the said bungalow.

[14] In response, the respondent wrote an appeal *vide* her letter dated 14 September 2009 ("the appeal letter") to the appellant, in which she explained that due to a *feng shui* configuration, variations of the original D construction plans had to be made, thus the breach of the height limit was not deliberate. The respondent also made a request for a waiver of the height limit as prescribed in the consent for construction in respect of the respondent's house.

E **[15]** By a letter dated 25 November 2009, the respondent informed the appellant that she had obtained the approval of MBSA, *vide* its letter dated 19 October 2009, of her new design of the bungalow which was over and above the permitted height of 12.192m. There was no reply whatsoever from the appellant in respect of the respondent's letters dated 14 September 2009 (the appeal letter) and the letter of 25 November 2009 (seeking approval of F the new design and plan).

[16] Meanwhile the respondent carried on with the construction of the house which was subsequently completed. As is customary in this industry, a rebate of 5 % for early completion was given to the respondent by the appellant on 30 September 2009. On 12 December 2009, the respondent G submitted to the appellant the respondent's owner occupancy registration form. The same was approved by the appellant on 20 December 2009 and thereafter, the respondent and her family moved into the house.

[17] Then, 11 days later ie, on 31 December 2009, the appellant issued a H stop work notice to the respondent, ordering the latter to immediately suspend all construction works on her property. The timing of the said letter of 31 December 2009 was odd, since the respondent had already moved in.

[18] Nothing happened until after about one year and four months later, ie, on 25 April 2011, when the appellant commenced an action against the I respondent for a declaration that the respondent was in breach of the DMC and the building guidelines. The appellant also claimed for an order of

specific performance of the terms of the DMC, in particular for the respondent to remove so much of the height of her house, so as to comply with the permitted height of 12.192m.

[19] The crux of the respondent's defence is that the appellant is precluded from enforcing the height restriction imposed by the DMC or the building guidelines due to the following:

(i) there is acquiescence and selective prosecution by the appellant, since the appellant took out proceedings against only ten out of a total of 40 homeowners who had breached the height limit of the DMC and the building guidelines;

(ii) estoppel;

(iii) in the alternative it is the respondent's contention that the appellant is precluded from pursuing the remedy of specific performance, due to the equitable doctrine of laches where the appellant did not pursue its legal rights with reasonable dispatch. The respondent would suffer great prejudice if specific performance is granted.

Decision Of The High Court

[20] The learned trial judge held that the respondent was in breach of the DMC and the building guidelines and granted specific performance of the same against the respondent. The respondent was ordered to comply with the terms of the DMC and observe the permitted height of 12.192m and to remove or demolish so much of the height of the building as had been constructed.

[21] It was the finding of the learned trial judge that despite the issuance of the notice to stop work dated 31 December 2009, the respondent continued with the construction of the bungalow on her property and had completed building her house beyond the height limit permitted by the appellant.

[22] The court in allowing specific performance, was of the view that a strict enforcement of the terms of the DMC is essential, having regard to the object and purpose of the DMC and the fact that the project is within a gated community. It held that the order of specific performance against errant homeowners is vital since strict compliance of the DMC is called for in community living such as this. A breach thereof would lead to a floodgate of cases where a house owner would cite any reason whatsoever for non-compliance with the terms they had covenanted. This would defeat the object and purpose of the DMC, and would create disharmony in such a community. The fact that some other homeowners had also breached the terms of the DMC is of no relevance in determining the appellant's action. The DMC was executed separately by the homeowners and was therefore mutually exclusive of any breach of the covenants would be dealt with in separate actions.

[23] With regard to the defences of acquiescence and estoppel, the learned trial judge adopted the position that the equitable defences raised by the respondent are not available to the latter. The learned trial judge was persuaded by the ruling in *Taikoo Shing (Management) Ltd v. Trillon (HK) Ltd* [1997] 4 HKC 304 which stood for the proposition that the equitable defences relied upon by the respondent ceased to operate if the applicant was a trustee for enforcement of the covenants on behalf of the other homeowners.

Decision Of The Court Of Appeal

[24] On appeal, the Court of Appeal agreed with the findings of breach of the DMC made by the learned trial judge. However, the Court of Appeal interfered with the discretion exercised by the learned trial judge and substituted the order of specific performance with an order that the appellant be indemnified by the respondent for all costs and damages which the appellant may be ordered to pay other homeowners as a result of the respondent's breach.

[25] The Court of Appeal held that the learned trial judge had erred in law, in failing to properly and adequately consider the equitable defences raised by the respondent which were clearly relevant and applicable for the equitable relief of specific performance.

[26] Based on the facts and circumstances of the case, the Court of Appeal concluded that the defences of estoppel and acquiescence should have prevailed. The evidence showed that the appellant failed to either accept or reject the respondent's appeal dated 14 September 2009 when s. 9 of the DMC clearly confers discretion on the appellant's review panel to grant relaxation as regards to the height of the roof which is over and above the originally approved height of 12.94m. The Court of Appeal found that not only did the appellant failed to give consideration to the respondent's appeal, the respondent was then "rewarded" by the appellant with a discount for early completion of the building, notwithstanding that at this juncture, the breach as regards to the height of the roof had already occurred. The Court of Appeal found that the respondent as a lay person was entitled to infer that by the appellant providing the said discount shortly after the receipt of the respondent's appeal letter and with knowledge of the respondent's revised plans, the appellant did not enforce the height restriction in the originally approved plan. Moreover the respondent was allowed to move into the completed house on 20 December 2009 without the imposition of any condition (such as a notice to demolish the offending roof). Relying on the authority of *Cheung Yuet & Anor v. The Incorporated Owners of Oriental Gardens* [1979] HKLR 536 the Court of Appeal then concluded that the defences of acquiescence and estoppel must be made available to the respondent against the appellant, to bar the relief of specific performance.

Submission Of The Parties

[27] Before us, counsel for the appellant averred that in view of the terms of the DMC, the defences of acquiescence and estoppel are not applicable to the facts and circumstances of this case. It was submitted that the court must examine the relationship of all the parties under the DMC in particular the position of the appellant as the manager of the gated housing project which is that of trustee.

[28] It was submitted that by s. 30.1 of the DMC, the DMC is a contract between the appellant and the homeowner and the homeowners *inter se*.

Section 30.1 reads:

> This Deed has the effect of a contract under seal:
>
> (a) Between the Developer, the Owner and the Homeowners Company (when it is incorporated); and
>
> (b) Between this Owner and each Precinct 3 Owner under which each of the above named agrees to observe and perform the provisions of this Deed as in force for the time being so far as these provisions are applicable to that person.

[29] Reference was also made to s. 35.2 of the DMC which reads:

> Nothing in this Deed or the Sale and Purchase Agreement shall be construed so as to render it obligatory whether at law or in equity, for the Management to enforce the terms and covenants of this Deed entered into by all the Other Homeowners against the other non-complying Precinct 3 Owners. If the Owner requests in writing, the Management may if it deems expedient, take such action to enforce the provisions of the Deed of Mutual Covenants entered into with the other Homeowners provided that the Owner shall first have deposited with the Management such sum as may be stipulated by the Management as security for the cost of such action which shall be borne by the Owner and subject to the Owner indemnifying the Management against all costs and expenses as the Management may reasonably require.

[30] The appellant averred that the above provisions showed that the appellant and other homeowners have independent legal rights against recalcitrant homeowners and that one can act to the exclusion of the other. Being the manager of the gated and guarded housing project, the appellant, at its discretion may enforce the terms of the DMC to any homeowner. The rights of other homeowners are unaffected by any action or inaction on the part of the appellant. In this connection, the nature of the appellant's obligation under the DMC can be described as a trustee and not as an agent. It was then submitted that the equitable defences raised by the respondent must not be made available to the respondent. Counsel for the appellant urged the court to adopt the principle laid down in the case of *Taikoo Shing* (*supra*) which held that the defence of acquiescence would not be available against the estate manager operating under the DMC.

A **Decision**

[31] It is our view that the Court of Appeal erred in its approach and interpretation of s. 35.2 of the DMC. In our view, s. 35.2 is to be read in conjunction with s. 30.1(b) of the DMC, which deals with the contractual relationship between an owner and each Precinct 3 owner; and that in such
B a situation, the appellant has discretion to enforce the terms of the DMC against any or all non-complying Precinct 3 owners.

[32] It is noted that in respect of any breach of the building guidelines (with reference to s. 34), it is for the appellant to take action against errant
C homeowners as well as to proceed in law or in equity to compel compliance with the terms of these guidelines. Section 34 of the building guidelines reads as follows:

> Any breach of any of these Guidelines shall entitle the Management to recover all costs involved from the errant Precinct 3 Owner and to prohibit
D the Contractors of that Precinct 3 Owner and/or their workers from entering the relevant Precinct 3 Lot and/or the Precinct 3, or to proceed in law or in equity to compel compliance with the terms of these Guidelines. Invalidation of any of the provisions of these Guidelines by any judgment of any court shall in no way affect any of the other provisions herein which shall remain in full force and effect.

E **[33]** Counsel for the respondent cited the decision of Lord Eldon in *Roper v. Williams* (1822) T&R 18 where it was held that a landlord who relaxes a covenant in favour of a selected number of tenants, entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant. The court did not hold the defences of laches and
F acquiescence to be inapplicable. The principle in *Roper*'s case was adopted by the court in *Peek v. Matthews* (1867) VCW 515 which also dealt with a covenant between the purchasers *inter se*. In that case the court made the following observation:

> The principle point is this: here is a common scheme, and it is one thing
G to say that parties may pursue any remedy they may be entitled to at law, and another thing to say that this Court will grant specific performance of an arrangement which can only be carried out in part. A Court of equity will say, the vendor cannot enforce these rules when he has suffered the whole of his original design to be broken up

H **[34]** At this juncture, it must be pointed out that the above principles of law must be applied with caution. The law as propounded in the above cases has been explained and expanded by two decisions of the Court of Appeal in *German v. Chapman* [1877] 7 Ch D 271 and *Knight v. Simmonds* [1896] 2 Ch 294.

I **[35]** The appellant is seeking the equitable relief of specific performance of the DMC, for the respondent to demolish and adhere to the approved height limit of the respondent's bungalow. The objective of a deed of mutual

covenants is that it circumscribes the common law right of the owner of the land in such a scheme, for the purpose of preserving the character of the land to be laid out and used in a particular way.

[36] Thus it is requisite that the court gives regard to the restrictive words therein which the plaintiff is seeking to enforce, and the object behind them (see *German v. Chapman*, *supra*).

[37] The relief of specific performance is a discretionary remedy. In any suit for specific performance, the court will consider the conduct of the plaintiff and the circumstances of the defendant before making any decree. Standard grounds of defence in equity such as laches and acquiescence will provide a defence to a claim for specific performance. In common law, there can be no reason why these defences must not be extended to cases involving breaches of deed of mutual covenants. This principle of law has been propounded clearly by the Court of Appeal in *Knight v. Simmonds*, *supra*.

[38] The facts in *Knight v. Simmonds*, *supra* involved an estate consisting of 250 acres, which was sold in the year 1852 for 54 lots. It was sold for the purpose of building residential houses. There were restrictive covenants that no trade or business should be carried on upon the lot. The defendant bought a portion of the estate in 1893, with full notice of those restrictive covenants. The defendant carried on business as a laundryman on his property. The plaintiff sought an injunction. The defendant's defence was that this was not a proper case in which to enforce the restrictive covenant against him, because the nature and character of the property had been altered. Some residents in the same estate were also carrying on some kind of business. The trial judge made a finding that the character of this property has not been altered and granted an injunction.

[39] The Court of Appeal affirmed the finding of the trial judge. It was held that no grounds have been shown to disentitle the plaintiff from the relief which he sought. Such breaches of the scheme and covenants as there had been, were trivial and privately carried on, and that there had been no acquiescence on the part of the residents in breaches of the scheme.

[40] In *Knight v. Simmonds* Lindley LJ summed up the relevant law at pp. 297 to 298 as follows:

> When a court of equity is asked to enforce a covenant by a decree of specific performance or granting an injunction, in other words, when equitable as distinguished from legal relief is sought, equitable as distinguished from legal defences have to be considered. The conduct of the plaintiff may disentitle him from relief; his acquiescence in what he complains of, or his delay in seeking relief may of itself be sufficient to preclude him from obtaining it. *Sayers v. Collyer* and *Roper v. Williams* illustrate this. In both of those cases the court refused to enforce restrictive covenants at the instance of the particular plaintiffs. But,

A further, before granting equitable relief, Courts of Equity look not only to the words of a covenant but to the object to attain which it was entered into, and if, owing to circumstance which have occurred since it was entered into, that object cannot be attained, equitable relief will be refused. This doctrine was laid down and acted upon by Lord Alden and Sir Thomas Plumber in *Duke of Bedford v. Trustees of the British Museum* and
B by Vice Chancellor Wood in *Peek v. Matthews* and was recognised in *German v. Chapman*. It is upon this ground that restrictive covenants intended to preserve the character of land to be laid out and used in a particular way will not be enforced if the land has already been so laid out or used that its preservation as intended is no longer possible. Such
C a state of things can seldom, if ever, have arisen except from a departure by the vendor and the purchasers from him from the scheme, or from the acquiescence or laches of those entitled to enforce the observance of the covenants in question; but, whatever the explanation of the altered state of things may be, if the object to be attained by the covenant cannot be attained, equitable relief to enforce it will be refused.

D **[41]** In view of the above decision, the applicable principles when dealing with a claim for specific performance arising from a breach of mutual covenants could be summarised as follows:

(i) a covenantee who seeks a decree of specific performance must bring his case within the plain meaning of the contract which he is seeking to
E enforce. In this regard the court has a duty to look into the words which restrict the rights of the parties and the object to be attained by the covenants.

(ii) a covenantee who seeks to enforce a term in a covenant must have acted *bona fide* and this can only mean that the action is brought for the
F purpose of giving effect to the object for which the covenant was originally entered into. Therefore in the event the object to be attained by the covenant cannot be attained by enforcement of the contractual term, equitable relief to enforce it will be refused.

G (iii) the terms of the covenants will not be enforced "if the land has already been so laid out or used that its preservation as intended is no longer possible." In the circumstance there must be evidence showing the "altered state of things" leading to the fact that the preservation of the terms of the covenants is no longer possible. Thus, equitable relief to enforce the covenants will be refused if the plaintiff has debarred himself
H from such relief by delay or acquiescence. Such a state of things also include a departure by the vendor and the purchasers from the scheme and laches of those entitled to enforce the observance of the covenants. In this regard, the court must be satisfied that "the property has been either entirely or so substantially changed such that the whole character
I of the place or neighbourhood has been altered so that the whole object for which the covenant was originally entered into must be considered to be at an end." (*German v. Chapman*, *supra*).

(iv) waiver of breaches in any single instance of the covenants must not be construed so as to render the whole object of the covenant to be at an end. The fact that some homeowners have breached a term of the covenants and there is evidence of waiver of such breach, do not have the effect of releasing other covenantors from any restrictive covenant of the same kind. In this regard it would be relevant to refer to the judgment of James LJ in *German v. Chapman*, *supra* which states that:

> If there is a general scheme for the benefit of a great number of persons, and then, either by permission or acquiescence, or by a long chain of things, the property has been either entirely or so substantially changed as that the whole character of the place or neighbourhood has been altered so that the whole object for which the covenant was originally entered into must be considered to be at an end, then the covenantee is not allowed to come into the court for the purpose merely of harassing and annoying some particular man, where the Court could see he was not doing it *bona fide* for the purpose of effecting the object for which the covenant was originally entered into. That is very different from the case we have before us, where the plaintiff says that in one particular spot far away from this place, and not interfering at all with the general scheme, he has, under particular circumstances, allowed a waiver of the covenant. I think it would be a monstrous thing to say that nobody could do an act of kindness, or that any vendor of an estate who had taken covenants of this kind from several persons could not do an act of kindness, or from any motive whatever relax in any single instance any of these covenants, without destroying the whole effect of the stipulations which other people had entered into with him. For instance, in this very case application was made to the plaintiff for a waiver. It would be monstrous to suppose, if he had acceded to that application, that therefore he was, by the mere act of kindness to the defendants themselves, destroying the whole benefit of the covenants as to all the rest of the estate. It appears to me it is impossible to apply the principles.

[42] In the present case, the DMC is a contract between the appellant and the homeowner and the homeowners *inter se*. It must be borne in mind that the neighbourhood is a gated and guarded housing project managed by the appellant. Section 3.4 of the DMC states that the objective of the DMC is to promote communal lifestyle, enjoyment and beneficial occupation by all homeowners and to regulate the relationship between the appellant and the purchasers. This is the spirit of the DMC that all the covenantees sought to preserve.

[43] The homeowners covenanted that the construction of houses in the area must be in accordance with the building guidelines which is attached as the Fifth Schedule in the DMC. Undoubtedly the guidelines are essential for purposes of uniformity in the construction of the houses in the housing area.

A It stands to reason that in construing the provisions of the building guidelines, the homeowners including the respondent are to adhere to the objectives of the guidelines. The latter is designed to govern the conduct and obligations of the appellant, the respondent and other homeowners in respect of the erection of houses in the gated community area including such restrictions
B thereof, for the protection and benefit of the project as a whole and all of the Precinct 3 owners and occupants. Although relaxations may be granted by the appellant's review panel, it must not have any adverse impact on the rights of other homeowners of the adjoining Precinct 3 lots. Section 9 of the building guidelines states that:

C > ... Relaxation may be considered for minor encroachments or where special circumstances exist and the Precinct 3 Owner is able to demonstrate to the Review Panel that the objectives of these Guidelines are not compromised and that there is no adverse impact on adjoining Precinct 3 Lots, roads, streetscape or Community Areas.

D **[44]** One other crucial point is that instead of relying on the general terms in the DMC, the building guidelines itself contains specific provisions on the legal consequences for non-compliance of its terms. Section 34 of the DMC gives the right to the appellant to take action against errant homeowners as well as to proceed in law or in equity to compel compliance with the terms
E of these guidelines. A serious message should be served on the contracting parties that they are to conduct their affairs in accordance with the guidelines in order to preserve the object and purpose of the DMC and the building guidelines.

[45] In the present case, it cannot be disputed that the respondent had
F contravened the provisions laid down in the building guidelines. However the Court of Appeal took the position that the respondent was entitled to assume that the offending height of the house was no longer in issue. The respondent was of the view that the payment of 5% rebate by the appellant for early completion of the building insulated her and fortified her legal
G position. Relying on the authority of *Cheung Yuet & Anor v. The Incorporated Owners of Oriental Gardens*, the Court of Appeal then concluded that the defence of acquiescence and estoppel must be made available against the appellant to bar the relief of specific performance. The Court of Appeal held that:

H > ... the case of *Cheung Yuet & Another v. The Incorporated Owners of Oriental Gardens (supra)* is authority for the proposition that the property management company vested with the responsibility to enforce mutual covenants is capable of acquiescing in a breach so long as the particular breach does not destroy the whole object for which the covenants were originally entered into (see page 540). The Court of Appeal (HK) also
I > ruled, in this case, that the question of the floodgates being opened as a result of this decision was without basis since the Court will not allow the breach of a particular owner to exceed that which other owners have been allowed to do by the property management company previously. The

Learned Trial Judge was not persuaded by this decision primarily because she adopted the ruling in *Taikoo Shing (Management) Ltd v. Trillon (HK) Ltd (supra)* that the property management company was a trustee/agent to enforce the terms of the mutual covenants and consequently bound to enforce the terms upon there being a breach as in this case. With respect, in our judgment, Her Ladyship erred in treating this case as authority for the proposition that the equitable defences relied upon by the appellant ceased to operate if the respondent was a trustee for the enforcement of the covenants on behalf of the other owners. The fact of the matter is that Justice Ze Li in *Taikoo Shing (Management) Ltd v. Trillon (HK) Ltd (supra)* recognised that the equitable defences would still avail the appellant as evidenced by the following passage in the judgment of the court:

> I am not saying that waiver, estoppels or acquiescence cannot be set up before the time limited has expired, but I should think the Court must be slow to find waiver, acquiescence or estoppels on the basis of silent or tardiness on the part of the applicant.

[46] The principle adhered to by the court in *Cheung Yuet* reflects the common law position in *Knight v. Simmonds* and *German v. Chapman*. Reference was made by the Court of Appeal (HK) to these English cases including the authority of *Roper v. Williams*.

[47] In *Cheung Yuet*, the appellants who were the owners of flats in Oriental Gardens had extended their sitting rooms of their flats beyond the authorised building line at the front side of the building and had enclosed the extensions by means of walls in which windows had been set in. The appellant's defence was that many of the other owners in Oriental Garden had committed similar breaches of covenant by adding rooms to their flats but that no action had been brought against them. The respondent had acquiesced to such breach. It is pertinent to note that unlike the present case before us, in *Cheung Yuet* there were no complaints made by the flat owners in Oriental Gardens.

[48] The trial judge granted mandatory injunction in favour of the respondent ie, the Incorporated Owners of Oriental Gardens and ordered the appellants to demolish the extensions. On appeal, the Court of Appeal allowed the appellant's appeal. In view of the overwhelming number of flat owners in all the four blocks in Oriental Garden who built extensions to their flats, (be it minor or major extensions thus committing the same kind of breach), it would be inequitable to compel the appellants to the said their extensions at the instance of the respondent. It was held that the respondent had acquiesced in the particular kinds of breach which the appellants had committed. This is the *ratio* in *Cheung Yuet*.

[49] *Cheung Yuet* is one case where the court refused equitable relief to enforce the term in the covenant because the object to be attained by the covenant cannot be attained by enforcement of the contractual term. In

commenting on the issue of floodgate of cases which had been raised by the appellant in that case, at p. 540 of the judgment, the Court of Appeal (HK) had this to say:

> It is argued that if the Defendants' flats are allowed to remain the Plaintiff will be able to do nothing to prevent further breaches of covenant, however serious. That is not so. It is not contended by the Defendants that the conduct of the Plaintiff has been to destroy the whole object for which the covenants were originally entered into, but that the Plaintiff has acquiesced in the particular kinds of breach which the Defendants have committed.

[50] Based on the above paragraph, the Court of Appeal was of the view that *Cheung Yuet* is a persuasive authority for the proposition that the property management company vested with the responsibility to enforce mutual covenants is capable of acquiescing in a breach so long as the particular breach does not destroy the whole object for which the covenants were originally entered into. However such proposition of law cannot be correct. Whilst it is true that a property management company vested with the responsibility to enforce mutual covenants is capable of acquiescing in a breach of covenant, it is inaccurate or rather confusing to impose a requirement that such breach must not destroy the whole object for which the covenants were originally entered into. The question to be asked is: Is this position legally sound?

[51] It must be highlighted that this is a case where the rights and obligations of the parties under the covenants have been expressly stated in the DMC and the building guidelines. Hence, knowledge is imposed upon the parties of their rights and obligations including the consequence for non-compliance of the terms specified in the building guidelines.

[52] The fact remains that the respondent, having obtained approval for the original design and plan for her bungalow, had then proceeded to make a variation to the same, for whatever personal reason she had. The appellant had not been informed until an inspection was conducted on the respondent's bungalow. But at that point in time, the house was almost completed. It was only after the respondent was asked to carry out rectification works that she wrote an appeal letter to the appellant for a waiver of such breach. Such overt acts on the part of the respondent suggests that she was merely taking a risk or pushing her luck when she caused to be erected a pitched roof which was higher than the approved limit, knowing full well she was in breach of the covenant. Thus the respondent in relying on the equitable defences did not come with clean hands.

(i) this case concerns a housing project in Precinct 3 which is still at an early stage of the project. All the homeowners entered into the DMC and agreed to be bound by the same "restrictions" in respect of the erection of their houses in their vacant lots as contained in the building guidelines for the whole benefit of the residents in the gated community.

(ii) various letters were sent by the complying homeowners to the appellant demanding stringent action to be taken against the 40 errant non-complying homeowners including the respondent so as to avoid a precedent being set for the remaining 212 purchasers of vacant lots in Precinct 3.

(iii) despite these notices, no action had been taken by the appellant against some of the errant owners. The position taken by the complying homeowners is that such waiver does in no way release other homeowners from the restrictive covenants under the DMC and the building guidelines.

[53] In the present case, the Court of Appeal committed an error in its judgment when it failed to give due consideration to the object and purpose of the DMC and the building guidelines.

[54] Based on the authorities discussed above, we are of the view that the appellant is entitled for a relief of specific performance. The orders made by the Court of Appeal are set aside and those of the trial judge are to be restored.

[55] Now, referring to the questions of law posed before the court:

(a) Where a DMC constitutes a contract between the developer and a homeowner and all homeowners *inter se*, whether the defence of acquiescence or estoppel is available when the developer's actions or inaction do not bind the other homeowners.

Question 1 is so drafted in view of the decision of *Taikoo Shing* which puts an estate manager in the position of a trustee with regard to the enforcement of mutual covenants. The argument was put by counsel for the appellant that from this perspective the respondent's action or inaction would not bind other purchasers and this shall disentitle the respondent from relying on the defence of acquiescence.

The answer is in the negative.

(b) The second question posed is:

Whether a court, that holds a party in breach of contract notwithstanding the defences of acquiescence or estoppel in answer to a cause of action, can refuse the relief of specific performance on the same defences.

Question 2 is also answered in the negative.

[56] The appeal is therefore allowed with costs.

[57] This judgment is prepared pursuant to s. 78(1) of the Courts of Judicature Act 1964, as our brother Justice Apandi Ali, FCJ had since resigned to take the post of the Attorney General of Malaysia.